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## State of Florida v. Tony A. Carwise

NEXT CASE ON THE COURT'S DOCKET IS STATE VERSUS CARWISE FOR THE BENEFIT OF THOSE ON THE LAST CASE ON THE COURT'S DOCKET, THE COURT WILL BE TAKING ITS REGULAR 15-MINUTE MORNING RECESS, AFTER THE ARGUMENTS IN THE CARWISE CASE.

GOOD MORNING. MY NAME IS ANN PHILLIPS, AND I AM HERE REPRESENTING THE STATE IN THIS APPEAL. THE CORPUS DELICTI WITH THE TRUST RATING APPROACH PROMULGATED BY THE U.S. SUPREME COURT IN AUBURN VERSUS UNITED STATES. UNDER THE DOCTRINE, IT IS SUBMISSIBLE IF IT IS SUBSTANTIALLY CORROBORATED, IF THE STATE INTRODUCE INDEPENDENT FACTS AND CIRCUMSTANCES AND WOULD GENERATE A BELIEF THAT THE DEFENDANT'S CONFESSION IS TRUE.

WHAT WOULD YOU SUGGEST TO US AS HAVING BEEN THE MAJOR CHANGE OR WHAT HAS OCCURRED THAT WOULD CAUSE THIS COURT TO REVERSE ITSELF FROM JUST A FEW YEARS AGO, FOR A VERY SHORT PERIOD OF TIME?

SINCE THIS COURT LAST DECIDED BY CORPUS DELECTURE I IN -- CORPUS DELICTI IN 1998, THERE HAS BEEN ADVANCEMENTS IN THE LAW. THE LAW HAS BECOME MORE COMPLEX AND TECHNOLOGY HAS BECOME MORE COMPLEX AND HAS CHANGED AND CASES SUCH AS THIS HAS DEMONSTRATED, HOW OUT MODERATED THIS COMMON LAW DOCTRINE HAS BECOME AND HOW IT IS NO LONGER USEFUL IN SOCIETY TODAY.

THE UNIQUE CIRCUMSTANCES THAT WE ARE DEALING WITH HERE, THAT EVEN IF WE WOULD ASSUME THIS KIND OF THING, WOULD THAT GIVE US SUFFICIENT REASON TO TAKE A BROAD BRUSH AND ELIMINATE THIS, IN ALL TYPES OF CIRCUMSTANCES? OR SHOULD IT BE JUST TYPE OF CASE WE ARE DEALING WITH HERE?

I BELIEVE IT DEFINITELY SHOULD BE IN AT LEAST THE TYPE OF CASES HERE, BUT SINCE IT IS SUCH A WORKABLE DOCTRINE IN ALL INSTANCES, I BELIEVE THAT THIS COURT SHOULD ADOPT IT FOR ALL CRIMES. IF THERE WERE NOT THE INHERENT UNFAIRNESS OF THE CORPUS DELICTI DOCTRINE AND THE FACT THAT THE TRUSTWORTHINESS DOCTRINE DID NOT ACTUALLY PROVIDE MORE PROTECTION TO A DEFENDANT, THEN I MIGHT AGREE.

WHY DO YOU SAY IT IS INHERENTLY UNFAIR TO REQUIRE THAT YOU HAVE THE LOSS ESTABLISHED AND THAT YOU HAVE, THAT IT HAS BEEN, THE LOSS HAS OCCURRED THROUGH CRIMINAL MEANS, BEFORE YOU GET INTO THESE OTHER AREAS? NOW, WHY DO YOU SAY THAT IS INHERENTLY --

I DON'T BELIEVE THAT IS INHERENTLY UNFAIR THAT THE STATE IS REQUIRED TO ESTABLISH THIS. I MEAN THAT IT IS UNFAIR IN THE FACT THAT IT DOES NOT ALLOW THE STATE TO UTILIZE OTHERWISE VIABLE CONFESSIONS THAT ARE TRUSTWORTHY, THAT ARE, THAT THERE IS NO SUGGESTION THAT THEY WERE SOMEHOW COERCED OR UNTRUE, AND IT PREVENTS THEM FROM USING THEM AND PROSECUTING OTHERWISE GOOD CASES. THE CORPUS DELICTI DOCTRINE WAS INTENDED TO FURTHER THREE BASIC POLICIES, TO PREVENT CONFESSIONS AND DERANGEMENT, MISTAKE OR OFFICIAL FABRICATION, AND SINCE THE CORPUS DELICTI DOCTRINE'S INCEPTION IN COMMON LAW, THERE HAS BEEN TREMENDOUS ADVANCES, AND THE ADVANCES THAT WE NOW HAVE IN MODERN SOCIETY ACTUALLY PROVIDE BETTER PROTECTIONS, AND I THINK IT IS UNFAIR

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WHAT KIND OF ADVANCES? THAT IS WHAT I AM HAVING A PROBLEM TRYING TO SEPARATE OUT. WHAT IS IT THAT REALLY HAS ADVANCED SO MUCH THAT WE STILL DON'T NEED TO PROTECT THOSE INTERESTS THAT WERE, THAT THE PURPOSE WAS THIS CORPUS DELICTI DOCTRINE IS TO PREVENT CONVICTING A DEFENDANT, BASED ON HIS OWN CONFESSION, WHICH MAY HAVE BEEN COERCED OR OTHERWISE, SO WHAT HAS CHANGED IN THE YEARS SINCE THEN? ISN'T THAT STILL A WORTHY GOAL? THAT WE NOT HAVE DEFENDANTS CONVICTED JUST ON THEIR OWN CONFESSIONS ALONE?

ACTUALLY AND THE -- ABSOLUTELY AND THE TRUSTWORTHINESS DOCTRINE WOULD NOT ALLOW A DEFENDANT TO BE CONVICTED, JUST BASED ON A CONFESSION ALONE.

WHAT IS TRULY DIFFERENT ABOUT THIS CORROBORATION DOCTRINE THAT WE ARE TALKING ABOUT, VERSUS THE CORPUS DELICTI? YOU WOULD STILL HAVE TO HAVE INDEPENDENT EVIDENCE, OUTSIDE OF A DEFENDANT'S CONFESSION OF, THAT THERE WAS, IN FACT, A CRIME COMMITTED, AND THAT THERE WAS SOME EVIDENCE THAT, OF THE ELEMENTS OF THE CRIME. WOULDN'T YOU? I MEAN ISN'T THAT WHAT CORROBORATION IS ALL ABOUT?

EXACTLY AND THAT IS WHY IT IS NOT A MAJOR LEAP TO ABOLISH THE CORPUS DELICTI DOCTRINE AND GO TO THE TRUSTWORTHINESS DOCTRINE, BECAUSE YOU ARE PROVIDING THE SAME PROTECTION. THEY ARE NOBLE GOALS, AND THE TRUSTWORTHINESS DOCTRINE PROVIDES HIGHER PROTECTIONS FOR THE DEFENDANT, BECAUSE THE CORPUS DELICTI RULE WAS NEVER SUITED TO PROTECT THE DEFENDANT IN THE WAY THE TRUSTWORTHINESS DOCTRINE CAN.

WHAT WOULD YOU SHOW, SAY IN A CASE LIKE THIS, THAT WOULD SHOW TRUSTWORTHINESS THAT IS DIFFERENT FROM WHAT YOU WOULD SHOW, IN ORDER TO SHOW CORPUS DELICTI?

UNDER THE TRUSTWORTHINESS DOCTRINE, WE LOOK TO THE CONFESSION ITSELF, AND WE HAVE TO CORROBORATE THAT CONFESSION, ITSELF, RATHER THAN SHOW ELEMENTS OF A CRIME. SHOWING THE ELEMENTS OF A CRIME DOES NOT DEMONSTRATE THE TRUSTWORTHINESS OF THAT CONFESSION. IF YOU ARE TRYING --

WHAT WOULD SHOW THEM BASICALLY IS THAT THE POLICE DIDN'T BEAT UP ON THE DEFENDANT AND THOSE KINDS OF THINGS? IS THAT WHAT WE ARE TALKING ABOUT AS SHOWING TRUSTWORTHINESS?

NO. YOU ARE TALKING ABOUT THE FACTS THAT EXIST, THE FACTS AND CIRCUMSTANCES OF THE CASE MUST SUPPORT THE DEFENDANT'S CONFESSION.

LET ME USE AN EXAMPLE. MAYBE YOU CAN HELP ME. IF THERE WAS A BURGLARY AND THE DEFENDANT SAID HE WENT INTO THE POLICE STATION AND CONFESSED TO THIS BURGLARY OF A HOME, AND HE SAID YOU ARE NOT GOING TO FIND MY FINGERPRINTS ANYWHERE, BECAUSE I WAS WEARING GLOVES, EXCEPT THERE WAS A BLACK BOX UNDERNEATH THE BED WHERE THEY KEPT THE JEWELRY, AND I TOOK OFF MY GLOVES, AND I FELT THE BLACK BOX AND THE JEWELRY, AND YOU WILL FIND MY FINGERPRINTS THERE, AND THEY GO BACK AND THEY FIND THE FINGERPRINTS THERE, AND FINDING THE FINGERPRINTS ADDS TRUSTWORTHINESS TO THE FACT THAT THIS PERSON REALLY DID COMMIT THE BURGLARY, BECAUSE IT WOULDN'T HAVE BEEN THERE, HAD HE NOT COMMITTED THE BURGLARY.

ABSOLUTELY, AND NOBODY ELSE WOULD HAVE KNOWN THAT BUT FOR THE PERSON THAT COMMITTED THAT CRIME, AND SO THAT IS WHAT WE HAVE GOT HERE. WE HAVE GOT A SET OF FACTORS SETTING OUT THERE THAT, WHEN YOU LOOK AT HIS SITUATION, WE CAME HERE TOGETHER, THE FACTS BRIEFLY WERE THAT THERE WERE, A POLICE OFFICER HAPPENED TO FIND A CAR THAT HE BELIEVED TO BE STOLEN. IT WAS PARKED IN A HOTEL PARKING LOT. HE DID THIS ON ROUTINE PATROL. HE BELIEVED THE CAR WAS ABANDONED. HE STARTED TO APPROACH THE VEHICLE, IN ORDER TO GET THE VIN NUMBER, TO RUN A SEARCH AND SEE IF IT WAS IN FACT SOLE

120E8 ENT APPEARED AS -- STOLEN. IT APPEARED AT FIRST AS NO ONE WAS IN THE VEHICLE. HOWEVER, AS THE OFFICER APPROACHED TO LOOK AT THE VIN NUMBER, THE DEFENDANT POPPED HIS HEAD UP OUT OF THE FRONT SEAT AND AS THE DOOR BEGINS TO OPEN, THE OFFICER SAYS WAIT, WAIT, CLOSE THE DOOR, AND AS HE DOES THAT, THE DEFENDANT SLIPS A GUN UNDER --

AS I UNDERSTAND THIS CASE AND THE STATE'S POSITION IS THAT WHAT THIS WOULD BE WOULD BE A CONSPIRACY TO COMMIT ARMED ROBBERY.

CORRECT.

CORRECT?

YES.

NOW, IF YOU TAKE AND THE TRUSTWORTHINESS, IF THE TRUSTWORTHINESS DOCTRINE WOULD BE IN THIS CASE, IT WOULD GO TO THE FACT THAT THERE WAS A SECOND PERSON THAT CORROBORATED, THAT THIS WAS WHAT THEY WERE THERE TO DO. IS THAT BASICALLY CORRECT?

YES. I THINK WE WOULD HAVE MORE DIFFICULT TIME PROVING INSURES, IF, AS THIS, AS IN THIS CASE, THEY WERE WAITING FOR THE THIRD PERSON TO SHOW UP BEFORE THEY ACTUALLY COMMITTED THE ARMED ROBBERY. IF THERE WAS MORE THAN ONE PERSON IN THE CAR, THEN THEY WOULD NEVER BE ABLE TO PROVE IT, BECAUSE THERE WAS THAT THIRD PERSON.

IN THIS ATTEMPT, HOW FAR DOES THAT GO? I MEAN, IF THESE INDIVIDUALS WERE SITTING AROUND IN THE PARKING LOT AND SAYING WE NEED SOME MONEY AND THE ONLY WAY WE ARE GOING TO BE ABLE TO GET IT IS TO TAKE THESE SKI MASKS AND PUT THEM ON AND COMMIT A ROBBERY, WOULD THAT BE THE TYPE OF THING THAT, THEN, THERE WAS ANOTHER ONE THAT SAID YEAH, WE SAT AROUND AND HAD THAT CONVERSATION, WOULD THAT BE ENOUGH TO BE A CONSPIRACY, TO BE AN ATTEMPT FOR ARMED ROBBERY?

YOU WOULD HAVE TO SHOW THAT THE CODEFENDANT AGREED TO COMMIT THAT CRIME, THAT THEY INTENDED TO COMMIT THAT OFTEN -- THAT OFFENSE, SO, YES, IN THAT SITUATION, BUT IF YOU ARE TALKING ABOUT CHARGING AN ATTEMPT, THEN I AM GOING TO NEED A STEP IN FURTHERANCE OF THAT ACT, SO IF THE STATE WOULD ACTUALLY CHARGE THEM WITH ATTEMPTED ROBBERY, THEN I COULD NOT TAKE THE FACTS, BECAUSE THEY WOULD HAVE COMMITTED THAT IN FURTHERANCE.

IF THE STATE'S POSITION IS THAT THE TRUSTWORTHINESS DOCTRINE OFFERS MORE PROTECTION TO THE DEFENDANT, SOMETHING IS WRONG WITH THE PICTURE THAT I AM HAVING, BECAUSE DEFENDANTS SEEM TO SAY NO, I WANT IT. THE STATE IS SAYING WHAT WE WANT TO DO BY THIS IS GIVE MORE PROTECTIONS, AND WHAT I AM THINKING ABOUT, IS THE STATE'S POSITION THAT THE TRUSTWORTHINESS DOCTRINE MOST GUARDS AGAINST FALSE CONFESSIONS, IN OTHER WORDS THAT THE CORPUS DELICTI NEVER FOCUSES ON WHETHER THE PERSON DID IT?

CORRECT.

JUST WHETHER A CRIME HAS BEEN COMMITTED.

EXACTLY.

WHEREAS THE TRUSTWORTHINESS, IF SOMEONE COMES IN AND SAYS I COMMITTED A CRIME, THE ISSUE IS NOT WHETHER A MURDER OCCURRED BUT WHETHER THE DEFENDANT IS THE RESPONSIBLE INDIVIDUAL.

EXACTLY.

NOW, DO WE NOT HAVE ANYTHING, ALSO, THAT PROTECTS IN THIS A STATE, AGAINST THAT SITUATION, SOMEONE FALSELY CONFESSING INDEPENDENT OF THE CORPUS DELICTI DOCTRINE? I MEAN, IN OTHER WORDS, WHY WOULDN'T BOTH RULES BE GOOD THINGS TO HAVE, THAT IS THAT YOU HAVE GOT, FOR MANY CASES, ESPECIALLY FOR THE MURDERS, YOU WANT TO HAVE THE CORPUS DELICTI, BUT YOU, ALSO, SHOULD HAVE A TRUSTWORTHINESS DOCTRINE, BECAUSE YOU HAVE GOT, AS WE KNOW, MORE AND MORE, IS CONCERNED WITH THE FALSE CONFESSION, SO WHY WOULDN'T BOTH BE GOOD IDEAS, WORKING IN TANDEM TO, YOU KNOW, PROTECT A DEFENDANT AGAINST BEING CONVICTED ON HIS WORD ALONE.

BECAUSE IN THOSE INSTANCES TRCK IS NOT THE CORPUS DELICTI RULE THAT IS PROVIDING THE PROTECTION. IT IS THE MOTION TO PROTEST THE EXCLUSIONARY RULES AS PART OF THAT CONFESSION.

IN LOOKING AT JUDGE SHARP'S DEFENSE, IT SEEMS TO ME THAT IT COULD BE ARGUED THAT THE CORPUS DELICTI HAS BEEN ESTABLISHED BY THE MASK AND THE GUN AND THAT HAVE WE GOTTEN TOO TECHNICAL, AS FAR AS THAT THERE HAS TO BE EACH AND EVERY ELEMENT OF THE CRIME, AS OPPOSED TO IF YOU GO BACK TO THE COMMON LAW, THAT THERE HAD TO BE A CRIME COMMITTED, AND AN INJURY OR LOSS. WELL, YOU DON'T HAVE THAT WITH ATTEMPT, SO IS THERE SOME FLEXIBILITY THAT YOU DISCERN THAT FLORIDA'S RULE DOESN'T ALLOW, THAT STILL WOULD ALLOW THE RETENTION OF THE CORPUS DELICTI DOCTRINE BUT IT DOESN'T HAVE TO BE EACH AND EVERY ELEMENT OF THE CRIME, IS WHAT HAS TO BE ESTABLISHED?

THE CORPUS DELICTI RULE, ITSELF, AS THIS COURT STATED, YOU HAVE TO PROVE EVERY ELEMENT, SO I THINK YOU HAVE TO COME UP --

IF THE 50 STATES HAVE COME UP WITH 50 DIFFERENT EXPLANATIONS UNDER ABOUT 1,000 DIFFERENT FACTUAL SCENARIOS, THEN YOU CAN READ ALL THOSE CASES.

SURE.

AND THEY ARE ALL ALL OVER THE PLACE, AREN'T THEY?

YES, WHICH IS WHAT THE STATE SAID, AND I BELIEVE WHY THE CORPUS DELICTI RULE HAS OUT USED ITS USEFULNESS. COURTS ARE MANIPULATING IT SO MUCH.

IF IT IS JUST TRUSTWORTHINESS DOCTRINE AND IT HAS TO BE SUBSTANTIAL, INDEPENDENT EVIDENCE, HOW IS THAT ADMINISTERED? WHAT DOES THAT MEAN? IS THAT LIKE COMPETENT SUBSTANTIAL EVIDENCE? WHAT DOES THAT MEAN? MAYBE THAT GOES BACK TO WHAT JUSTICE QUINCE WAS ASKING.

I THINK IT IS GOING TO BE ALMOST LIKE A PREPONDERANCE STANDARD. YOU ARE NOT GOING TO HAVE TO HAVE THE UNREASONABLENESS FOR THE CORPUS DELICTI OR UNDER THE TRUSTWORTHINESS DOCTRINE, TO ADMIT THE DEFENDANT'S CONFESSION. I AM GOING TO HAVE TO REACH THAT STANDARD, IS THE STATE, PRIOR TO CONVICTION.

WE DON'T HAVE TO HAVE ALL OF THE ELEMENTS NOW. CORPUS DELICTI. ARE YOU SAYING THAT ALL OF THE LAW INSISTS THAT YOU HAVE TO PROVE EVERY ELEMENT OF THE OFFENSE, BEYOND A REASONABLE DOUBT?

SOME EVIDENCE UNDER EVERY ELEMENT, UNDER THE CORPUS DELICTI.

WELL, THAT IS NOT BEYOND A REASONABLE DOUBT. JURIES DON'T MAKE FINDINGS BEYOND A REASONABLE DOUBT, IN ORDER TO FIND THAT -- JUDGES DON'T FIND THAT THE CORPUS DELICTI RULE HAS BEEN MET BEYOND A REASONABLE DOUBT. ONLY GOING BACK TO SOME EVIDENCE?

YES.

WOULDN'T SOME OF THE CORPUS DELICTI STANDARD HAVE BEEN MET? ISN'T THERE A LAW ESTABLISHED THERE?

NOT --

IN THAT HYPOTHETICAL, ALL YOU NEEDED TO DO WAS SHOW A BURGLARY, AND THEN YOU COULD ADMIT THAT THE CONFESSION PROVIDED ALL OF THE DETAILS, CORRECTA?

THAT'S CORRECT.

SO THE CORPUS DELICTI RULE WOULD NOT PREVENT THE ADMISSION OF THE CONFESSION IN THAT SITUATION, WOULD IT?

NOT IN THAT INSTANCE, BUT IT DOES IN CASES LIKE WE HAVE HERE TODAY, WITH ATTEMPTS AND CONSPIRACYS AND INCOENT CRIME.

I GUESS I AM HAVING DIFFICULTY IF THE RULE THAT YOU ARE REQUIRING WOULD ESTABLISH SUBSTANTIAL, INDEPENDENT EVIDENCE OF A CRIME. ISN'T THAT, THAT ALMOST SOUNDS TO ME, LIKE A GREATER REQUIREMENT THAN THE CORPUS DELICTI RULE, WHICH ONLY REQUIRES SOME EVIDENCE OF EACH OF THE ELEMENTS OF THE CRIME.

IT WOULD DEPEND ON HOW THIS COURT OR OTHER COURTS WOULD WANT TO INTERPRET WHAT IS SUBSTANTIAL EVIDENCE. THERE HAS NOT BEEN --

I GUESS I AM SUGGESTING THAT IT IT APPEARS TO ME THAT WE HAVE SORT OF A MINIMALIST APPROACH RIGHT NOW, TO THE PROOF OF CORPUS DELICTI. THAT IS AS LONG AS THERE IS SOME EVIDENCE, INDEPENDENT OF A CONFESSION THAT IS SEEKING TO BE ADMITTED, OF THE COMMISSION OF A CRIME, THEN THAT CONFESSION CAN GO IN, SO YOU KNOW, IF IT ISN'T, GO AHEAD, I AM SORRY.

BUT THE STATE'S REAL CONCERN IS THE INCOENT CRIMES, CONSPIRACY OR ATTEMPT.

WHERE THERE IS NO TANGIBLE LOSS THAT THIS STATE CAN POINT TO.

SO YOU CAN'T MEET THE FIRST ELEMENT.

PROVING THE CORPUS DELICTI.

I CAN'T PROVE THAT SOMETHING WAS INTENDED TO BE DONE. I CAN'T SHOW THAT THAT CRIME WAS COMMITTED.

ISN'T THAT AN INHERENT DIFFICULTY WITH CONSPIRACY, IN AN ATTEMPT-TYPE OF CRIME, THAT THERE IS A VERY FINE LINE, AS JUSTICE WELLS INDICATES, AS TO WHETHER OR NOT, REALLY, A CRIME HAS BEEN COMMITTED, AND HASN'T THERE ALWAYS BEEN A DEBATE, AS A MATTER OF FACT, THAT YOU ARE GOING TO CHARGE SOMEBODY BECAUSE THEY COMMITTED A CRIME, AND OF COURSE IF THEY COMMITTED THE CRIME, THEY MUTTS HAVE SPRD TO -- THEY MUST HAVE SPRD TO COMMIT IT TO BEGIN WITH, SO THAT YOU END UP WITH ACTUALLY, SOME PEOPLE ARGUING, DOUBLE PUNISHMENT, FOR JUST COMMITTING THE ONE ACT, BECAUSE THEY KNEW IN ADVANCE THEY WERE THEY WERE GOING TO ROB THIS 7-11.

THAT IS ACTUALLY WHAT HAPPENED IN INSTANCES OF INCOENT CRIME, AND THE TRUSTWORTHINESS DOCTRINE ALLOWS THOSE CONFESSION TO SAY COME IN, WHEN THE STATE PROVES THAT OTHERWISE THEY WERE VOLUNTEERTARY AND REASONABLE -- VOLUNTARY AND

REASONABLE, WHILE IT PROVIDES THE SAME PROTECTION UNDER THE CORPUS DELICTI RULE.

CHIEF JUSTICE: IF YOU WANT TO SAVE SOME TIME FOR REBUTTAL, THE MARSHAL HAS INDICATED THAT YOUR TIME IS UP.

THANK YOU.

GOOD MORNING, JUSTICES, I AM GEORGE BURTON. I AM HERE ON BEHALF THE RESPONDENT, TONY CARWISE, WHO WAS, AS WAS STATED EARLIER, CONVICTED OF POSSESSION OF A HANDGUN AND ATTEMPTED ARMED ROBBERY. I THINK WHAT THE COURT WAS FACED WITH TODAY IS WHAT KIND OF LEGACY YOU WANT TO LEAVE IN NEXT GENERATION ABOUT DUE PROCESS, BECAUSE THAT IS WHAT WE ARE REALLY TALKING ABOUT HERE.

THIS IS ONE OF THE QUESTIONS I WANTED TO ASK THE STATE. I CAN ASK YOU. IS THIS CORPUS DELICTI RULE A PROCEDURAL RULE OR A SUBSTANTIVE RULE. IS IT FOUNDED IN THE, YOU ARE SAYING IT IS UNDER THE SUBSTANTIVE DUE PROCESS CLAUSE OR IS IT UNDER THE PROCEDURAL DUE PROCESS? AND THAT MATTERS A LOT, FOR THE OTHER CASES, WHERE THE LEGISLATURE HAD ABROGATED THE RULE, AND IN CASES, AND ALSO WOULD MAKE A DIFFERENCE HERE AS TO WHETHER ANY RULING WE WOULD MAKE THAT WOULD CHANGE IT WOULD BE RETROACTIVE OR DEFECTIVE. WHAT IS YOUR POSITION ON THAT?

MY POSITION IS IT IS SUBSTANTIVE DUE PROCESS, BECAUSE IF YOU GO BACK TO THE HISTORY OF THE CORPUS DELICTI RULE, WE GOT IT FROM ENGLAND AND COMMON LAW. ENGLAND DIDN'T HAVE SUCH A STRINGENT CORPUS DELICTI RULE. IN FACT THEY HAVE ABANDONED IT, BUT WHAT HAPPENED IN THE UNITED STATES IS THEY MADE IT MORE STRENGTH THAN EVER, AS A PART OF OUR FOUNDING FATHERS' BELIEF OF DUE PROCESS, SO I WOULD SAY IT IS SUBSTANTIVE.

SO THE LEGISLATURE COULD COME IN AND SAY THAT, FOR ALL CHARGES OF CONSPIRACY, THAT THE CORPUS DELICTI RULE DOES NOT APPLY.

WELL, THE LEGISLATURE COULD PASS A LAW IN THIS -- PASS A LAW AND THIS COURT COULD MAKE JUDGMENT AS TO WHETHER OR NOT --

IT IS SUBSTANTIVE AS TO WHETHER OR NOT THE LEGISLATURE COULD PASS THAT LAW, IS IT NOT?

THEN I RETRACT MY ANSWER. IT IS SUBSTANTIVE AND PROCEDURAL. BECAUSE REALLY --

LET ME ASK YOU THIS. YOU SAID THAT HE WAS CONVICTED OF ATTEMPT. THE FIFTH DISTRICT'S OPINION SAYS HE WAS CONVICTED OF CONSPIRACY TO COMMIT ARMED ROBBERY.

I WAS THINKING, YES, THAT'S CORRECT.

BUT ISN'T THERE A REAL DIFFERENCE, THERE, IN TERMS OF THE FACT THAT THE, YOU HAVE GOT, AS I UNDERSTAND WHAT THE EVIDENCE WAS HERE, THAT THERE WAS THE MASK AND THE GUN AND THEN THERE WERE THESE, THIS CONFESSION, THEIR STATEMENT THAT WE WERE ABOUT, HERE TO "JACK SOMEBODY". THE FACT IS THAT THEY HADN'T ACTUALLY TAKEN ANY, WAS THERE ANY OVERT ACT TOWARD THE COMMISSION OF THE ARMED ROBBERY?

THERE WAS NOT ANY OVERT ACT, NO.

AND SO WE DEFINITELY HAVE A SITUATION HERE, IN WHICH THE, IT WAS A STATEMENT OF A CONFESSION OF WHAT WAS IN THE MIND OF THESE PEOPLE, ABOUT WHAT THEY WERE ABOUT TO DO.

THAT IS CORRECT.

BUT WHAT ABOUT THE SITUATION WHERE THE PEOPLE ARE NOT SITTING THERE IN THE HOTEL PARKING LOT OR SITTING OUTSIDE THE BANK WITH THE CAR RUNNING, AND THEY HAVE THE WEAPONS AND ALL OF THE INDICIA THAT THE ONLY REASON THEY ARE SITTING OUT THERE IS TO ROB THE BANK?

IT MAKES A STRONGER CASE, IF YOU WERE TO APPLY THE TRUSTWORTHY DOCTRINE AT WHICH TIME CERTAINLY WOULD. BUT I THINK THAT JUSTICE CANTERO'S EXAMPLE, AS EXPLAINED BY CHIEF JUSTICE ANSTEAD, IS THAT THE DOCTRINE ALLOWS IT TO BE PROVEN, JUST AS IN THAT CASE, I THINK THE CORPUS DELICTI WOULD BE PROVEN, IF FINGERPRINTS WERE FOUND IN THE JEWELRY BOX UNDER THE BED. THAT IS INDEPENDENT CORROBORATIVE EVIDENCE OF THE CRIME COMMITTED IN THAT HOME.

BUT IS IT YOUR POSITION THAT THE CORPUS DELICTI RULE WOULD REQUIRE THE STATE, BY SOMETHING LESS THAN BEYOND A REASONABLE DOUBT, TO SHOW EACH OF THE ELEMENTS OF A CRIME, IN ORDER TO BE ABLE TO INTRODUCE THE CONFESSION?

WHEN WE TALK ABOUT JURY INSTRUCTIONS, THE JUDGE CERTAINLY INSTRUCTS THE JURY THAT EACH ELEMENT MUST BE PROVED BEYOND EVERY EXCLUSION OF EVERY REASONABLE DOUBT.

APPARENTLY WE SAID IN STATE VERSUS ALLEN AND LATER CONFIRMED THAT IN BURKES THAT, THAT CORPUS DELICTI REQUIRES THE GOVERNMENT TO SHOW EACH ELEMENT OF THE OFFENSE, NOT JUST CORROBORATING EVIDENCE THAT A LOSS OCCURRED OR THAT THE OFFENSE OCCURRED, BUT EACH SINGLE ELEMENT, SO SOME OFFENSES MAY HAVE FIVE OR SIX ELEMENTS, AND THE STATE HAS TO SHOW EACH INDEPENDENTLY SHOW EACH SINGLE ELEMENT, BEFORE THEY ARE ABLE TO INTRODUCE THE CONFESSION.

YES, AND THEN THE JURY DECIDES WHETHER THAT EVIDENCE IS SUBSTANTIAL ENOUGH TO PROVE IT BEYOND A REASONABLE DOUBT.

WHY, IN ORDER TO PROTECT THE DEFENDANT AND PROTECT CONFESSIONS THAT ARE COERCED, WHY DO WE NEED A RULE THAT REQUIRES THE STATE TO PROVE EACH SINGLE ELEMENT OF THE OFFENSE, RATHER THAN SOMETHING LESS THAN THAT, LIKE INDEPENDENT CORROBORATION OF THE CRIME OR SOMETHING LIKE THAT?

I THINK, EXCELLENT QUESTION, JUSTICE CANTERO, AND I THINK IT GOES TO THE QUESTION THAT JUSTICE LEWIS ASKED AT THE OUT SET, FROM WHEN THIS DECISION WAS LAST MADE. WHAT HAS CHANGED FOR THE POLICY DECISION TO BE IMPLEMENTED? ARE THERE ANY LESS DERANGED PEOPLE IN SOCIETY? I SUBMIT NOT. IS THERE ANY LESS MISTAKES BEING MADE OUT THERE? LOOK AT DNA EVIDENCE AND WHAT HAS BEEN UNCOVERED, WHAT HAS HAPPENED IN ILLINOIS, LOOK WHAT HAS HAPPENED IN NEW ORLANDO EEBBS, LOSS ANG-- NEW ORLEANS, LOS ANGELES. ARE THERE ANY FABRICATIONS GOING ON?

I UNDERSTAND THAT THERE ARE REASONS WHY WE SHOULD NOT RECEDE FROM OUR CASES, BUT MY QUESTION IS THERE ARE VARSITYRATION OF THE CORPUS DELICTI RULE AROUND THE UNITED STATES, AND APPARENTLY SOME STATES DON'T HAVE AS DRINKENT A -- AS STRINGENT A CORPUS DELICTI RULE AS WE DO. THEY REQUIRE THAT A LOSS OCCURED, BUT THEY DON'T REQUIRE THAT EACH SEPARATE ELEMENT OF THE CRIME BE PROVED BEFORE THE CONFESSION IS INTRODUCED, SO WHY SHOULDN'T WE RETAIN THE CORPUS DELICTI RULE, BUT DO SO IN A WAY THAT IS NOT AS ONEROUS TO THE STATE, BEFORE THESE CONFESSIONS ARE INTRODUCED?

BECAUSE THERE HAS BEEN NO POLICY POSTURE PUT FORTH BY THE STATE THAT WOULD JUSTIFY IT.

IF WE GO BACK TO THE COMMON LAW AND THE IDEA THAT NOBODY, THERE WERE PEOPLE APPARENTLY CONFESSING TO MURDERS THAT HADN'T OCCURRED, CORPUS DELICTI MEANT, WELL, YOU WANT TO MAKE SURE THERE WAS SOME INDICATION OF A BODY. AND SAME THING WITH, SO NOW I AM CONCERNED MORE IN THE IDEA OF WE NOW DO HAVE THESE CRIMES THAT DIDN'T EXIST AT COMMON LAW, THESE CONSPIRACY CRIMES THAT ARE THE SAME CRIMES WHICH HAVE OTHER CONCERNS FOR WHETHER DEFENDANTS ARE, COULD BE CONVICTED OF SOMETHING WHERE THERE REALLY WASN'T ANYTHING THEY DID OTHER THAN THINK ABOUT COMMITTING A CRIME. HOW, I AM JUST, IN PRACTICAL TERMS, HOW DOES THE CORPUS DELICTI PRINCIPLE TRANSLATE INTO THE INCOATE CRIMES? I THINK THAT IS MORE THE INTELLECTUAL CONCERN. WE ALL SAY THAT THOSE ARE GOOD IDEAS. WE WANT TO MAKE SURE THAT THESE PEOPLE AREN'T LULLED INTO CONFESSING TO SOMETHING THEY DIDN'T DO, BUT I AM HAVING TROUBLE WITH HOW IT REALLY TRANSLATES, AND I GUESS THIS CASE, IN TERMS OF AS AN EXAMPLE, WHERE YOU HAVE GOT INDEPENDENT EVIDENCE OF THE GUN AND THE MASK AND YOU KNOW, THE TIME OF DAY THAT SAYS THAT, LOOKS LIKE SOME CRIME WAS ABOUT TO BE COMMITTED, WHETHER IT WAS GOING TO BE KIDNAPING OR ARMED ROBBERY OR SOME CRIME WAS ABOUT TO BE COMMITTED. WHY ISN'T IT GOOD ENOUGH TO SAY SOME CRIME IS GOING TO BE COMMITTED AND THERE IS NO INDICATION THAT IT WAS A FALSE CONFESSION. THE STATE JUST COULDN'T PROVE WHAT SPECIFIC CRIME IT WAS GOING TO BE BUT IT WAS SOME CRIME. WHAT IS WRONG WITH THAT?

THAT IS BECAUSE YOU ARE ACCEPTING OFFICER EISNER'S WORDS. YOU ARE ACCEPTING HIS, THAT THE RESPONDENT TESTIFIED AT TRIAL AND REPUDIATED THOSE STATEMENTS. YOU DON'T HAVE THEM ON AT THE SAME TIME YOU DON'T HAVE A VIDEO. YOU DON'T HAVE THEM WRITTEN DOWN. THAT IS WHY.

IS THAT DIFFERENT RULES? HAS ANY STATE SAID THAT, TO MODIFY THE CORPUS DELICTI RULE, THAT THE CONFESSION, ITSELF, WOULD HAVE TO BE TAPED, WHICH MIGHT BE A GOOD PRINCIPLE OF LAW, BUT I DON'T SEE ANY STATE THAT HAS GONE AND TRIED TO SAY, LOOK, WE ARE GOING TO LOOK AT OTHER WAY TO SAY MAKE CONFESSIONS RELIABLE, LIKE IN ILLINOIS THEY SUGGESTED THAT THEY BE ON VIDEOTAPE, AND THEN YOU HAVE SOME WAY OF KNOWING WHETHER THAT CONFESSION WAS RELIABLE. THAT IS A DIFFERENT ISSUE, ISN'T IT?

LET ME ASK A QUESTION. I AM SORRY. GO AHEAD. I BELIEVE THE STATE HAS TO COME HERE AND SHOW YOU THAT SOCIETY HAS CHANGED, THAT WE DON'T HAVE TO BE WORRIED ABOUT POLICE FABRICATION, AND IT HAS BEEN THE OPPOSITE. IT HAS BEEN THE OPPOSITE. IF YOU ARE A TAXPAYER IN LOS ANGELES COUNTY RIGHT NOW, THE LAWSUITS FROM ALL OF THE PEOPLE THAT WERE WRONGFULLY PUT IN JAIL THERE IS STAGGERING, SO THE NUMBER ONE EMMY SHOW IS THE SHIELD WHERE THEY ARE GLORIFYING CORRUPT POLICEMEN.

LET ME ASK IN THIS CASE, IF THESE DEFENDANTS, I APOLOGIZE, JUSTICE PARIENTE, IF THESE DEFENDANTS HAD STEPPED OUT OF THE CAR AND HAD THE GUNS IN THEIR POCKETS AND THEIR HANDS, AND THEY WERE HEADING TOWARDS THE LOBBY OF THE HOTEL, AND THE POLICE OFFICER HAD COME UPON THEM, AND THE SAME CONFESSION MADE AND TESTIFIED TO THE OFFICER, YOU WOULD AGREE THAT THE CORPUS DELICTI RULE WOULD NOT HAVE APPLIED.

THAT IS CORRECT, JUSTICE BELL. HOW --

AND THE ISSUE WOULD HAVE BEEN THE CREDIBILITY OF THE OFFICER AND YOUR CLIENT, JUST AS IT IS NOW, RIGHT?

THAT --

SO HOW DOES THE CORPUS DELICTI RULE PRINCIPLE, UNDER THE TWO SCENARIOS, REALLY GO TO THE UNDERLYING QUESTION OF THE TRUTH, AND THE PURPOSE OF THE TRIAL PROCESS IS TO MAKE SURE THAT THE TRUTH IS RECEIVED AND GIVE THE OPPORTUNITY, IN THIS CASE, TO THE

JURY TO DETERMINE DO THEY BELIEVE THE OFFICER OR DO THEY BELIEVE THE DEFENDANT IN THE CASE.

I THINK THE FIFTH DISTRICT WAS VERY CRAFTY TO BRING THIS CASE FORWARD, BECAUSE IT IS CONSPIRACY. CONSPIRACY IS A VERY DIFFICULT CASE, WHEN YOU TALK ABOUT THIS, WHICH IS WHAT I HAVE HEARD FROM YOUR QUESTIONS. CONSPIRACY IS PROVEN EVERYDAY, BECAUSE YOU HAVE THE TAPED CONVERSATIONS AND SO FORTH. TECHNOLOGY HAS IMPROVED SO MUCH FOR LAW ENFORCEMENT. THEY ARE HAVING NO PROBLEM PROVING CONSPIRACY IN THIS SOCIETY, BUT YOU KNOW, IN CASES LIKE THIS, THEY WON'T BE ABLE TO, AND THAT IS BETTER FOR ALL OF US, AND THAT IS THE BOTTOM LINE HERE, JUSTICE PARIENTE. IT IS BETTER FOR ALL OF US.

BUT, AND EVEN IN THIS CASE, CAN WE TRULY SAY THAT CONSPIRACY HAS NOT BEEN DEMONSTRATED? I MEAN, WHILE YOU HAVE TO DO ALL OF THE ELEMENTS OF THE CRIME, IN ORDER TO SHOW THE CORPUS DELICTI, IT DOESN'T HAVE TO BE DIRECT EVIDENCE IN ORDER TO PROVE. THAT IT CAN BE CIRCUMSTANTIAL EVIDENCE, CAN'T IT?

THAT IS CORRECT AND THAT IS JUSTICE CANTERO'S EXAMPLE.

IN THIS CASE WHERE WE HAVE TWO PEOPLE WITH MASKS, ONE PUTTING A GUN UNDER THE CAR AS THE POLICE IS APPROACHING AND THOSE KINDS OF ACTS THAT TOOK PLACE IN THIS CASE, HOW CAN WE SAY THAT THERE WASN'T A CONSPIRACY BETWEEN THESE TWO PEOPLE TO TAKE SOME KIND OF CRIMINAL ACTION? COMMON SENSE, I THINK, JUDGE SHARP MAKES A GREAT POINT IN HER DISSENT, WHEN SHE TALKS ABOUT THE COMMON SENSE AND THE FACTS OF THIS CASE DEMONSTRATE THAT THERE WAS, IN FACT, A CONSPIRACY BETWEEN THESE PEOPLE TO COMMIT A CRIMINAL ACT.

WELL, ONE OF THE THINGS SHE RELIED UPON WAS THAT THEY WERE SITTING IN A CAR IN THE DARK, AND THEY CLEARLY WERE NOT IN THE DARK. THAT WAS A MISTAKE. I HATE TO SAY IT, JUSTICE MADE A MISTAKE BUT IT WAS. THE CAR, THE POLICE ARRIVED THERE AFTER EIGHT O'CLOCK IN THE MORNING NOT SEVEN, ACCORDING TO THE EVIDENCE HERE, SO HERE YOU SEE IN THE OPINION ITSELF, IT SHOULDN'T BE RELIED UPON. IT WAS A MISTAKE. SO --

BUT THE FACT OF THE MASKS AND THE GUN WAS NOT A MISTAKE, WAS IT?

NO, IT WAS NOT. BUT HERE IN LIES THE POLICY ISSUE YOU ARE GRAPPLING WITH. ARE WE CONCERNED ABOUT MISTAKES? YES. YOU SAW IT IN JUSTICE SHARP'S DISSENT. ARE WE CONCERNED ABOUT POLICE CORRUPTION? OF COURSE WE ARE. AND IT IS WHAT KIND OF SOCIETY YOU WANT TO LEAVE THIS BENCH WITH. YOU WANT TO ERODE THIS PROTECTION OR NOT?

I GUESS WHAT THE FIFTH DISTRICT SAID, JUDGE GREENE, I THINK, IN HER CON CONCERNS, SAID -- IN HER CONCURRENCE, SAID IT IS TRUE THAT WE HAVE A CONSPIRACY HERE. IT IS NOT CLEAR WHAT THE CONSPIRACY TRIED TO ACCOMPLISH, AND THAT IS WHY THERE WASN'T INDEPENDENT EVIDENCE AND WHY CORPUS DELICTI WASN'T PROVED. WE DON'T KNOW IF IT WAS A CONSPIRACY TO ROB OR TO KIDNAP OR DO SOMETHING ELSE. AND THEREFORE, WE CAN'T PROVE A CRIME, BUT WE CAN SHOW THAT THERE WAS SOME, THEY WERE GOING TO DO SOMETHING WRONG. WE JUST CAN'T SHOW EXACTLY WHAT THEY WERE GOING TO DO. DO YOU AGREE WITH THAT?

THAT IS CORRECT. THAT IS WHAT THE LAW IS.

IF THAT IS THE CASE, THEN WHY IS, AS YOU ARGUE, WHY IS SOCIETY FURTHERED BY DENYING INTRODUCTION OF THIS EVIDENCE, IF EVERYBODY AGREES THAT THEY WERE CONSPIRED TO COMMIT AN ILLEGAL ACT, AND THE ONLY THING THEY CAN'T PROVE IS WHICH TECHNICAL CRIME THEY ARE GOING TO COMMIT, WHETHER IT IS ROBBERY OR KIDNAPING. IT IS STILL AN ACT THAT ALL OF US AGREE WE SHOULD NOT ENCOURAGE, AND THEREFORE WHY IS SOCIETY FURTHERED BY THE FACT THAT WE CANNOT NOW PROSECUTE THESE PEOPLE FOR CONSPIRING TO COMMIT

SOME CRIME?

BECAUSE, JUSTICE CANTERO, YOU ARE GOING TO RELY ON TAKING THIS MAN'S LIBERTY ON THE WORD OF A POLICE OFFICER AND NOTHING ELSE. THAT WASN'T TAPED, THAT WASN'T, ANOTHER PERSON PRESENT. THIS OFFICER IS COMING TO COURT AND THIS IS HOW HE EXPLAINED HIS CONDUCT. WE ARE GOING TO BUY THAT AND PUT HIM IN PRISON, AND THAT IS NOT THE SOCIETY I WANT TO LIVE IN.

IF WE WENT TO THE TRUSTWORTHINESS DOCTRINE, WOULDN'T WE BE ABLE TO ASSESS THAT ARGUMENT AND HAVE THE COURT DETERMINE, AT TRIAL, I DON'T FEEL COMFORTABLE RELYING SOLELY ON A CONFESSION, WHEN IT IS NOT TAPED, IT IS NOT VIDEOED, AND THE ONLY THING WE HAVE IS THE POLICE OFFICER'S STATEMENT THAT THIS CONFESSION OCCURRED, AND THEREFORE UNDER THE TRUSTWORTHINESS DOCTRINE, I AM GOING EXCLUDE IT. IF THAT SEEMS AN ARGUMENT THAT WOULD MILL TATE IN FAVOR OF ADOPTING A TRUSTWORTHINESS ARGUMENT, DOCTRINE, OR YOU CAN TAKE THOSE ARGUMENTS INTO ACCOUNT.

WELL, JUSTICE CANTERO, LET'S TALK PRACTICAL MATTERS. IF THAT WAS THE CASE, IF YOU FOLLOW THE CON OCCURING OPINION IN THE FIFTH -- THE CONCURRING OPINION IN THE FIFTH, THEY WOULD HAVE PROBABLY PCA THIS CASE AND WE NEVER WOULD HAVE WENT THERE. WE WOULD NEVER HAVE KNOWN. THAT IS WHY. I HAVE TO TELL THAT YOU THIS IS NOT THE KIND OF SOCIETY YOU WANT TO LIVE IN. YOU DON'T. YOU WANT TO HOLD THE LINE AND PROTECT ALL THE GUARANTEES YOU CAN, BECAUSE YOU CAN MAKE AN ARGUMENT TO GET RID OF EVERY PROPHYLACTIC RULE THAT EXISTS!

LET ME ASK, THE FEDERAL COURTS IN THE OTHER 50 STATES OVER THE YEARS HAVE APPLIED THE TRUSTWORTHINESS DOCTRINE, AND I HAVE TRIED TO DO SOME RESEARCH, BUT I HAVEN'T FOUND ANY STATISTICAL RESEARCH, ANY LAW REVIEW ARTICLES OR ANY OTHER SCHOLARLY RESEARCH THAT INDICATES THE LIST OF HORRORS THAT YOU SEEM TO BE INDICATING IN RESPONSE TO THE OTHER JUSTICEES' QUESTIONS, WHERE IF WE DID APPLY THE TRUSTWORTHINESS DOCTRINE, THERE WOULD BE SOME IN JUST OR UNJUST EFFECT ON DEFENDANTS. CAN YOU HELP ME?

SURE. THE U.S. SUPREME COURT ACTED IN THE WAY THEY DID, I BELIEVE, BECAUSE THERE WAS AN EMERGING IDEA THAT THERE WOULD BE ADDITIONAL SAFEGUARDS FOR ACCUSED, THAT THEY COULD GO TO THIS TRUSTWORTHINESS AND LOWER THE BAR, BECAUSE MIRANDA HADN'T YET COME OUT BUT THEY WERE GOING THAT WAY, THAT THIS IS ABOUT, YOU KNOW, OUT OF COURT STATEMENTS. THIS IS ABOUT HEARSAY STATEMENTS BEING USED TO CONVICT SOMEBODY. THAT IS WHAT WE ARE TALKING ABOUT HERE, AND THEY WERE CONVINCED THAT THE FEDERAL SAFEGUARDS THAT WERE COMING INTO PLACE WOULD BE AN ADEQUATE SUBSTITUTE, AND WHAT HAS 50 YEARS SHOWN IN IS THAT THE CASE? I SAY NOT.

OTHER THAN THAT STATEMENT, CAN YOU POINT TO ANY RESEARCH STUDIES, LAW REVIEW ARTICLES, OR ANYTHING ELSE THAT GIVE SOME EMPIRICAL SUPPORT FOR THAT ARGUMENT? THAT THE TRUSTWORTHINESS DOCTRINE IS NOT, INDEED, TRUSTWORTHY?

WELL, NOT IN SPECIFIC TERMS, I DON'T BELIEVE SUCH A STUDY EXISTS, BUT I THINK THAT YOU CAN SEE, WITH HOW DNA HAS EVOLVED, THAT SOME OF THESE PEOPLE WERE CONVICTED, BASED ON THEIR OWN STATEMENTS OF THOSE YOU MADE AND DNA HAS EX-CON RATED THEM. -- HAS EXONERATED THEM.

HERE WE GET BACK TO THAT QUESTION OF CORPUS DELICTI DOESN'T MEAN YOU HAVE TO SAY WHO DID IT. YOU HAVE THE DEFENDANTS UP IN NEW YORK THAT CONFESSED TO A RAPE. A RAPE OCCURRED. IT JUST WASN'T THEM. SO CORPUS DELICTI DOESN'T HELP AT ALL IN THOSE SIXS OR A MURDER OCCURS -- IN THOSE SITUATIONS, OR A MURDER OCCURS, IT IS ALL THOSE BODIES, OR LIKE ANYONE IS COMING BACK FROM THE DEAD AND SAYING, HEY, I WASN'T MURDERED. IT IS A

QUESTION OF WHO DID IT. SO THE CORPUS DELICTI RULE HAS NOTHING TO DO WITH PROTECTING THAT SITUATION. UNLESS YOU CAN HELP ME OUT. DO YOU AGREE WITH THAT?

YES. I AGREE WITH YOUR OBSERVATION. YOUR OBSERVATION IS WHAT WE CALL A RED HERRING, BECAUSE IT IS TALKING ABOUT A DIFFERENT MATTER THAN CORPUS DELICTI.

YOU ARE THE ONE THAT BROUGHT UP THAT ALL OF THE PEOPLE EXONERATED ON DEATH ROW WERE FOUND NOT TO BE RESPONSIBLE FOR A CRIME BUT THERE WAS A CRIME THERE. EACH OF THOSE CASES HAD CORPUS DELICTI ESTABLISHED.

IT IS DIFFICULT TO ARGUE THAT, BECAUSE ONE IN JUSTICE OCCURRED, WE CAN GET RID AFTER SAFEGUARD, BECAUSE THAT IS ESSENTIALLY WHAT WE ARE SAYING THERE. WE ARE SAYING THAT THESE IN JUSTICES HAVE OCCURRED SO WHY WORRY ABOUT THIS RULE. IT CAN HAPPEN AS AN IN JUSTICE ANYWAY, SO I THINK THAT IS A POOR ARGUMENT TO MAKE IN SUPPORT OF ADOPTING THE TRUSTWORTHINESS DOCTRINE, CERTAINLY.

HAS ANY STATE THAT HAS ADOPTED THE TRUSTWORTHINESS DOCTRINE REQUIRED THAT, IN ORDER TO HAVE ADDITIONAL CORROBORATION, THAT THE CONFESSION WOULD HAVE TO BE ON TAPE, EITHER YOU KNOW, THROUGH A WIRETAP OR A VIDEOTAPE OR SOME OTHER PROTECTION LIKE THAT?

I AM NOT AWARE OF THAT, BUT THAT WOULD BE SOMETHING, CERTAINLY, THAT WOULD GIVE ME MORE COMFORT TO ERODE THIS PROTECTION, IF SOMETHING LIKE THAT WAS TO OCCUR, BECAUSE THAT IS ONE OF THE POLICY REASONS THIS COURT ADOPTED THE POSITION IT HAS, AND NOTHING HAS CHANGED. AS JUSTICE LEWIS BEGAN THIS DAY, WHAT HAS CHANGED? ABSOLUTELY NOTHING. WE KNOW, MORE THAN EVER, THAT THESE PROTECTIONS ARE VERY VALID AND VIOLATION.

BUT DO YOU KNOW IN THE FIFTH DISTRICT, OTHER THAN SINCE OUR JB DECISION OR ANY OF THE APPELLATE DISTRICTS, HAVE THEIR BEEN ANY OTHER ACQUITTALS OR ANYTHING THAT, YOU KNOW, WITH THESE CONSPIRACYS? DO WE KNOW ANYTHING ABOUT THE NUMBERS OF CASES WHERE CORPUS DELICTI CANNOT BE ESTABLISHED?

I HAVEN'T SEEN SUCH A STUDY, BUT YOU KNOW, ACCORDING TO JUSTICE McDONALD, YOU KNOW, IT DOESN'T SEEM TO BE A LOT OF THEM, ACCORDING TO HIS WORDS.

I WAS WONDERING, SINCE JB, WHETHER THERE WERE ANY OTHER CASES OUT THERE OTHER THAN CARWISE.

NO, NOT THAT I AM AWARE OF.

CHIEF JUSTICE: OKAY. THANK YOU VERY MUCH. MR. MARSHAL, HOW MUCH TIME ON REBUTTAL?

THANK YOU, YOUR HONOR. IN ANSWER TO YOUR QUESTION, JUSTICE PARIENTE, IN THE STATE'S RESEARCH, WE FOUND AT LEAST SIX CASES WHICH HAVE BEEN REVERSED ON APPEAL, BASED ON LACK OF PROVING CORPUS DELICTI, AND THAT DOES NOT COUNT THE CASES THAT NEVER MADE IT UP TO APPEAL BECAUSE THE STATE EITHER COULD NOT PROSECUTOR DID NOT HAVE SUFFICIENT EVIDENCE TO EVEN CHARGE OR APPEAL, SO I KNOW THAT THERE ARE SIX AT LEAST, ON APPEAL THAT HAVE BEEN REVERSED FOR LACK OF CORPUS DELICTI.

SIX OVER WHAT PERIOD OF TIME?

A FIVE-YEAR PERIOD OF TIME.

FIVE YEARS.

SO YOU ARE SAYING THAT THE STATE ACTUALLY MAKES THE DECISIONS. THEY LOOK AT THE EVIDENCE AND THEY LOOK AT THE CONFESSION, AND THEY DON'T FEEL THERE IS SUFFICIENT INDEPENDENT EVIDENCE TO ESTABLISH THE CRIME, NOT TO GO FORWARD WITH IT.

ABSOLUTELY. THE STATE HAS TO MAKE THOSE DECISIONS EVERYDAY. THEY HAVE PEOPLE THAT WALK IN ALL OF THE TIME THAT ARE GOING TO CONFESS TO A CRIME. THAT IS NOT, THE CORPUS DELICTI IS NOT WHAT IS PROTECTING THEM. IT IS THE OTHER SAFEGUARDS THAT HAVE COME INTO PLAY SINCE THAT TIME, SUCH AS THE MIRANDA AND THE EXCLUSIONARY RULE. UNDER THE CORPUS DELICTI RULE, THE JUSTIFICATION FOR THAT RULE WAS TO PREVENT THE CONVICTION OF INNOCENT PEOPLE BY FALSE CONFESSION.

DO WE HAVE ANY STATE THAT HAS TAKEN TRUSTWORTHINESS AND SAID THERE IS GOING TO BE AN ADDITIONAL REQUIREMENT THAT THE CONFESSION HAS TO BE ON TAPE, BEFORE THEY ARE GOING TO LOOK AT IT?

NO. THERE IS NONE THAT I AM AWARE OF. WHAT SOME STATES HAVE DONE IS, WHEN THEY HAVE ADOPTED A TRUSTWORTHINESS DOCTRINE, IF THEY BELIEVE THAT THE DEFENDANT WOULD LIKE THAT THEY COME UP WITH A JURY INSTRUCTION THAT INSTRUCTS THE JURY THAT THEY ARE NOT TO RELY SOLELY ON THE CONFESSION IN ORDER TO CONVICT.

WE ALREADY HAVE A SIMILAR TYPE OF JURY INSTRUCTION.

RIGHT. SO THE JURY INSTRUCTION IS OUT THERE THAT SAYS YOU ARE NOT TO RELY SOLELY ON THAT PIECE OF INDEPENDENT EVIDENCE. THE JURY HAS TO --

IS THE CON FINANCIAL -- IS THERE THE CONTENTION THAT WE OUGHT TO RECEDE FROM THE CORPUS DELICTI RULE IN ALL CASES, OR JUST IN CASES THAT HAVE TO DO WITH CONSPIRACY OR ATTEMPT THESE IN KO?

I THINK THE FACT FINDING PURPOSE IN CRIMINAL TRIALS, IT SHOULD BE ADOPTED IN ALL CASES.

SO EVEN IN A SITUATION IN WHICH THERE IS A DISAPPEARANCE OF A PERSON THE BODY CAN NEVER BE RECOVERED, BUT THE, THAT THERE IS GOING TO BE A RELAXATION OF THE RULE THAT YOU GOT IN FRONT OF THE COURTS OR YOU HAVE GOT TO HAVE DEMONSTRATED THAT THERE IS -

YOU ARE STILL GOING TO HAVE TO PROVE, BEYOND A REASONABLE DOUBT, BY THE TIME YOU GET A CONVICTION, THAT THAT CRIME HAS OCCURRED. I WOULD NOT CALL IT A RELAXATION.

THERE IS SOME EVIDENCE THAT HE HAS BEEN TALKING AROUND AT SEVERAL BARS THAT HE MURDERED SALLY, AND SALLY IS GONE, AND YOU HAVE GOT UNDER THE TRUSTWORTHINESS DOCTRINE AT SOME POINT, THAT STATEMENT IS GOING TO BE CONSIDERED TO BE A BASIS UPON WHICH TO GO FORWARD, IS IT NOT?

CORRECT, BUT WE ARE GOING TO HAVE TO HAVE EVIDENCE APART FROM THAT, IN ADDITION. THAT IS WHY THE DEFENDANT IS NEVER GOING TO BE CONVICTED, BASED ON THAT, BASED SOLELY UPON HIS CONFESSION.

IS THIS PRINCIPLE A PROCEDURAL OR A SUBSTANTIVE RULE?

IT IS A PROCEDURAL RULE, BECAUSE IT PROHIBITS THE ADMISSION OF EVIDENCE, i.e. THE CONFESSION WITHOUT OTHER PROOF.

SO THEREFORE THE OTHER STATUTES, SO WHAT ABOUT THE STATUTES WHERE THE LEGISLATURE HAS CHANGED THE RULE? IF IT IS A PROCEDURAL RULE, ISN'T THAT BEYOND WHAT THEY, THEIR

AUTHORITY?

IT CAN BE CONSIDERED SUBSTANTIVE. SOME SAY SUBSTANTIVE. TO THE EXTENT IT PROHIBITS A CONVICTION IN THE ABSENCE OF A CORPUS DELICTI. IT IS BASICALLY STATE WAG THAT CORPUS DELICTI IS, WHAT HAD THEY WOULD CONSIDER THE CORPUS DELICTI OF THAT CRIME ARE VERSUS ELEMENTS OF A CRIME ARE, AND I BELIEVE THAT IS WITHIN THEIR PURVIEW.

SO IF THAT WOULD BE THE CASE, EVEN IF IT WAS SOMETHING THAT WOULD BE SUBSTANTIVE, WE COULDN'T APPLY IT TO MR. CARWISE, EVEN IF WE WERE TO CONSIDER SOMETHING FOR THE FUTURE. WOULD YOU AGREE WITH THAT?

TO THE EXTENT IT WOULD BE SUBSTANTIVE, YES, BUT I BELIEVE IF YOU ARE LOOKING AT IT AS A NOVENTIA RULE, THAT IT IS PROCEDURAL.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL STAND IN RECESS BEFORE HEARING THE LAST CASE. 15 MINUTES.

MARSHAL: PLEASE RISE.